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FILED
APR 3 1954
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 671

ISAAC MITCHELL,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA AND SUPPORTING BRIEF

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STATE OF INDIANA,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Isaac Mitchell, prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Indiana, it being the highest court of last resort, in the State of Indiana, in which a decision could be had in the State of Indiana, entered November 19, 1953, affirming eight (8) judgments of the Criminal Court of Marion County, Indiana, Division No. 2, it being the trial court in which petitioner herein was charged by eight (8) indictments for the violation of the anti-gambling laws of Indiana. (Record pp. 3 to 21, incl.)

JURISDICTION

The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

That the principal Federal Question involved is the denial to petitioner of due process of law, as provided under Section 1 of the 14th Amendment to the Constitution of the United States of America, and due course of law as provided by the Art. 1, Sec. 12 of the Constitution of the State of Indiana, and Art. 1, Sec. 11 of the Constitution of the State of Indiana, providing for the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure, and a violation of Art. 1, Sec. 14 of the Constitution of the State of Indiana, providing that no person in any criminal prosecution shall be compelled to testify against himself.

STATEMENT

This case involves constitutional questions growing out of methods employed to convict petitioner on various alleged violations of the anti-gambling laws of the State of Indiana and based solely upon the authority of an Indiana Statute—Sec. 48-6111, Burns' 1950 Replacement—and which in the same opinion, which affirmed the trial court in this case, Mitchell v. State (1953), — Ind. —, 115 N. E. (2d) 595, did find said Sec. 48-6111, Burns' 1950 Replacement, void and unconstitutional, and in direct conflict with the Fourth Amendment to the Constitution of the United States of America and the Eleventh Section of Article 1 of the Constitution of the State of Indiana, which is in verbatim the same as the Fourth Amendment of the Constitution of the United States of America; that the petitioner has exhausted all avenues to relief under the procedures of Indiana and now seeks review here of duly raised federal issues.

HISTORY OF THE CASE AND OPINIONS BELOW

The petitioner, by counsel, did file a plea in abatement against each of the eight (8) indictments (Record p. 22 to Record p. 47, incl.), and to each of said pleas in abatement a demurrer was filed by the State and sustained by the court, after which petitioner herein, by counsel, did file Motion to Quash each of the eight (8) indictments (Record p. 48), and later filed Affidavit for Change of Judge, and the Honorable Thomas M. Scanlon was duly selected as Special Judge, who did thereafter qualify, and who did after argument overrule the motions to quash the eight (8) indictments, defendant by counsel waived arraignment and refused to plead, and the court entered a plea of not guilty on all charges. Defendant then waived jury trial and asked for an early trial, and the State refused to waive jury trial. It was then agreed that, if permissible by law, that said causes be consolidated for trial by jury (Record pp. 49 to 54 incl.), after which defendant, by counsel, did file Motion to Suppress Evidence, and a brief thereon, and after a hearing the court entered a stipulation that the Motion to Suppress should be sustained as to all property identified, and not contraband and overruled as to all other property. (Record pp. 53-54.) Defendant then filed an affidavit for Change of Venue from County, counter affidavit was filed by the State, and hearing and evidence was had thereon, and court denied said Motion for Change of Venue from Marion County. Defendant then objected to trial of the eight (8) cases before the same jury, on one proceeding, and moved the court that the State be required to elect upon which one of the indictments they would proceed, said objections and request was overruled, jury was then empanelled, accepted and sworn. Court then gave jury preliminary instructions

on its own motion. Several days were involved in the introduction of State's evidence, and after State rested, defendant, by counsel, moved for discharge and a directed verdict for mistrial, all of which said motions were overruled.

That eight (8) different verdicts of guilty and eight (8) different penalties were returned by the jury, and the Special Judge pronounced eight (8) different judgments, a judgment in each of the eight (8) different verdicts, on May 20, 1952. (Record pp. 54-56.)

That thereafter, defendant filed Motion and Supplemental Motion for New Trial and each were denied. (Record pp. 57-82.) Then defendant prayed an appeal to the Supreme Court of Indiana. Notices were duly served upon the State, the Clerk of the Criminal Court of Marion County, Division No. 2, and receipted and acknowledged by each. Briefs were duly filed in the time granted by the Supreme Court of Indiana, being the highest court of last resort in Indiana, did render their opinion and decision in Cause No. 28986, in which petitioner herein was appellant therein and respondent herein was the appellee therein. (Record pp. 87-92.)

That appellant did thereafter within the required time file his petition for a rehearing, and on January 6, 1954, same was denied by the Supreme Court of Indiana without opinion. (Record pp. 92-94.)

For the purpose of clarifying the nature of this action, more specifically it may be stated the petitioner herein, defendant therein, on December 11, 1951, was the lessee of certain premises, located at number 248 Indiana Avenue, and also included in said lease was an upstairs room used as office space and designated as 245 North Capitol Avenue.

On December 10, 1951, one Noel Jones, a police officer, purportedly wrote a letter to one John J. O'Neal, then his acting Chief of Police of the City of Indianapolis, advising him he was informed that gambling was taking place at the three addresses above listed. Pursuant to the statements in such unverified memorandum, the acting Chief of Police issued a written "AUTHORIZATION," directed to Noel Jones, a police officer, to enter the premises at 248 Indiana Avenue and 245 North Capitol Avenue and seize all gambling equipment found there, arrest all persons found there violating the law and deliver the gambling equipment over to the acting Chief of Police for destruction. Pursuant to said unlawful authorization, Noel Jones and other police officers and law enforcement officers entered the premises, and went into the partitioned office of petitioner herein, and the back room of the premises and seized not only tickets, tip books, pea shaker and other paraphernalia, but all the records, books, papers and documents. At the same time, other officers, by means of breaking down a door, entered premises described as 245 North Capitol Avenue, also leased by petitioner herein, and there seized and carried away a filing cabinet and other articles found there.

This search and seizure was an unlawful search and seizure and violated all constitutional rights under the Federal and State Constitutions, and under the purported authority of an unconstitutional statute, declared so by the opinion rendered by the highest court in the State of Indiana in this very case, a law which attempted to circumvent and abolish writ of a search warrant, by what is termed an "AUTHORIZATION," which was introduced in evidence over the objection of counsel for defendant in the lower court, and reads as follows:

AUTHORIZATION

"Pursuant to Sec. 48-6111, Vol. 9, Par. 2, Burns' Revised Statutes, 1950 Replacement, report has been made to me in writing that the premises located at 248 Indiana Avenue (1st floor, basement) are used for the deposit or sale of lottery tickets and policies and that said premises are used for playing for wagers or at games of chance. Now, therefore, I hereby authorize Noel Jones to enter said premises, arrest all persons there found offending against the law and seize all instruments of gaming and lottery tickets and deliver same to me.

(signed) John J. O'Neal,
Acting Chief of Police.
Indianapolis, Indiana,
December 10, 1951."

It is the contention of petitioner herein that the above purported "AUTHORIZATION" violates all of the constitutional protection of a person in their persons, houses, papers, and effects, and an unreasonable search and seizure, and is an unlawful attempt to substitute "AUTHORIZATION" for and in place of a lawfully constitutional search warrant.

Art. 1, Sec. 11 of the Constitution of the State of Indiana provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search or seizure, shall not be violated, and no warrant shall issue, but upon probable cause by oath or affirmation, and particularly, describing the place to be searched and the person or thing to be seized." (In verbatim the same as Amendment 4 to the Constitution of the United States of America.)

SPECIFICATIONS OF ERRORS TO BE URGED

Petitioner herein does further amplify the grounds for requesting a Writ of Certiorari be ordered herein as follows:

VERBATIM OPINION OF THE SUPREME COURT OF INDIANA IN THIS CAUSE

STATE OF INDIANA,
Appellee.

v.

ISAAC MITCHELL,
Appellant,

No. 28986.

From the Criminal Court of Marion County, Indiana, DIV. 2.

Thomas M. Scanlon, Special Judge
FLANAGAN, Judge.

Eight separate indictments charging various violations of the gaming laws were consolidated for trial and appellant was found guilty on each indictment. The trial was by jury.

The evidence consisted largely of what was discovered upon a search made pursuant to the provisions of Sec. 48-6111, Burns' 1950 Replacement, which reads as follows:

> "If any member of such force (reference is to police force) or if any two (2) or more householders in such city shall report in writing under his or their signature to the Chief of Police, that there are good grounds, stating the same for believing that any house, room or premises within such city are kept or used as a common gaming house, room or premises for therein playing for wagers or at any game of chance, or that such premises are kept for lewd or obscene purposes of amusement or for the deposit or sale of lottery tickets or policies, it shall be lawful for such chief, in writing, to authorize any member of such police force to enter such premises, and the officer so appointed shall forthwith arrest all persons found offending against the law, and seize all instruments of gaming

or lottery tickets, and deliver the same to the chief, who shall destroy them."

The first question presented is whether the above act is constitutional. Clearly it is not.

The Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Amendment 4."

The Constitution of the State of Indiana provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be so seized."

Sec. 11, Article 1.

The determination of the question whether there is probable cause for the issuance of a search warrant is a judicial function. Bedenarzik v. State (1933), 204 Ind. 517, 185 N. E. 114. The statute above quoted does not provide for such judicial determination, and is therefore unconstitutional and void.

The next question is whether appellant waived his right to complain about the illegal search. A motion to suppress was duly filed in which the illegality of the search was squarely presented.

On the hearing, certain property not here involved and not contraband was found to be the legitimate property of appellant and ordered returned to him.

But with that exception, the hearing showed that the appellant denied ownership of or interest in the property seized or the premises searched. In conformity with that contention of appellant, a stipulation was entered in which the court stated that after the return of the property claimed by the appellant as his, as above set forth, the motion to suppress should be overruled in all other respects.

This waived objections to the illegality of the search.

May v. State (1953), — Ind. —, 112 N. E. (2d) 439.

The question of the constitutionality of the above quoted statute is presented in a number of different ways. However, having decided that question, and the illegality of the search was waived, we will give no further notice to this question when further specifically presented.

We will proceed to examine other questions raised.

A plea in abatement was addressed to each indictment. To each of these pleadings a demurrer was sustained. The abatement pleas alleged (1) that the grand jury took the inquiry into appellant's alleged offenses out of order, and (2) that the prosecutor's office unduly influenced the action of the grand jury. No. 3.

Section 9-824, Burns' 1942 Replacement, sets out the order of business by a grand jury. But this act is advisory only. The grand jury being a part of the judicial branch of government must have reasonable discretionary power in determining the order of conducting its business.

The charge in the plea in abatement that the prosecutor's office unduly influenced the grand jury consists of allegations that too many witnesses were outside the grand jury room when the grand jury arrived there and that too many deputy prosecutors were allowed to be in the grand jury room. But these are only alleged conclusions that such facts had an undue

influence. Only facts well pleaded are admitted by a demurrer to a plea in abatement; conclusions cannot be considered and add nothing. Delong v. State (1929), 201 Ind. 302, 168 N. E. 22.

The demurrer was properly sustained.

Appellant filed motion for change of venue from the county on his pleas in abatement. Change was denied. We have held that no issues of fact were presented by the pleas in abatement. The only ground for change of venue from the county in a criminal case is the excitement or prejudice against the defendant in the county or some part thereof. Sec. 9-1301, Burns' 1942 Replacement. Motions for change of venue under this statute and for this cause are addressed to the sound discretion of the trial court in all cases except those punishable by death. Section 9-1305, Burns' Replacement. Assuming that a change of venue in a criminal case is proper upon a plea in abatement the case here, nevertheless, shows only questions of law presented. These questions we have decided against the appellant. It therefore follows that the trial court could not have abused its discretion to appellant's harm. The rule seems logical that where a demurrer is properly sustained to a plea in abatement in a criminal cause, no reversible error can exist in refusing a change of venue on such plea in abatement.

Appellant filed motions to quash the indictments on the grounds that they do not contain certain and definite averments as to the amounts of money involved and the particular games involved. As to the exact amounts of money involved, the grand jury alleges that the amounts are to them unknown. Upon careful examination of the several gaming statutes involved, we are unable to discover where in any of the gaming statutes involved the exact amount of money is an essential element of the offense, the fact that money and not another kind of property was involved is specifically set forth. This followed by the state-

ment that the exact amount is not known to the grand jury, that sufficiently describes the property involved. See Markle v. State (1852), 3 Ind. 53, and Lewis v. State (1888), 113 Ind. 59, 14 N. E. 892. As to the specific description of the nature of the game, appellant admits that the name of the game is set out, but that the indictments do not state the description or method by which the game is played. No such requirement is necessary.

State v. Bougher (1833), 3 Blackf. 307;
State v. Maxwell (1839), 5 Blackf. 230.

Appellant complains that a special venire of jurors was used without evidence that the regular panel had been exhausted. There is no evidence in the record that the regular panel had not been exhausted, and the statement of the court is there that it had been. In the absence of any showing to the contrary, we shall assume that the trial court properly performed its procedural functions. Appellant filed a motion for a change of venue from the county in the case proper, which upon presentation of evidence was denied, the evidence was conflicting and voluminous. The motion was addressed to the discretion of the trial court, Sections 9-1301 and 9-1305, Burns' 1942 Replacement. Vehling v. State (1936), 210 Ind. 17, 196 N. E. 107. No abuse of discretion is here shown.

Upon agreement of the parties, the eight separate indictments here involved were consolidated for trial "if that was permitted by the law." Later, appellant wanted them separated, and the State chose which it would pursue. We know of no reason why parties cannot agree to consolidate for trial several indictments charging violations of the gaming laws, as several counts of any indictment are tried together. Nor do we see why a defendant should, after entering into such an agreement, be permitted to ask for a separation, without asserting some reason therefor. Here no reason was given.

The court submitted this cause to a jury for trial after appellant had waived his right to trial by jury. He says this is error. Appellant was certainly entitled to a trial by jury and was entitled to waive that right. We know of no authority or reason for a contention that he had a right to demand trial without jury.

Appellant objects to certain witnesses being permitted to testify that they placed bets in his alleged place of business when he was not present. There had been evidence, from which the court could conclude, the appellant was the operator of the place in question and was there operating a gambling house. His presence certainly could not be vital to testimony of actual bets placed there.

Appellant wanted three peremptory challenges for each indictment, a total of twenty-four. Sec. 9-1502, Burns' 1942 Replacement provides for three peremptory challenges in cases of misdemeanor when the indictments were consolidated. There was one jury. The statute grants only three challenges as to each jury; the court properly denied this request.

Finally appellant objects to the giving and refusal of certain instructions.

His tendered instruction numbered 3 seeks to instruct the jury that the appellant could not be convicted under the particular indictment to which it relates. If the evidence showed that the defendant did not keep the device involved for gambling with another person for the purpose of obtaining money and appellant did not use the device to play games himself for the purpose of obtaining money from other persons, this is not correct. The statute in question, Sec. 10-2311, Burns' 1942 Replacement, provides that conviction may be based on the allowance of the use of the device for gaming purposes.

Appellant's tendered instruction numbered 5 is subject to similar objection. It seeks to instruct the jury that no conviction can be had unless the appellant himself gambled, but the statute under which the particular indictment to which this instruction relates, Sec. 10-2311, Burns' 1942 Replacement, provides that conviction may follow if the evidence shows that the defendant frequented any place where gambling was permitted.

Appellant objected to the State's tendered instructions numbered 1 and 3, because they state in effect that appellant's gambling operations could be carried out by agents. He says there can be no principal and accessories in the commission of a misdemeanor. With this we agree. The correct rule is that all concerned in the commission of a misdemeanor are liable as principals. McDaniels v. State (1916), 185 Ind. 245, 113 N. E. 1004. One operating in the gambling field, who takes the profits but has agents or servants actually handle the details, certainly is concerned in the commission of the misdemeanor. We find no reversible error in the record."

Judgment affirmed.

GILKISON, J., not participating. (115 N. E. (2d) 595.)

(Record pp. 87-92.)

This application for a Writ of Certiorari is filed under Rule 38½ of the SUPREME COURT OF THE UNITED STATES OF AMERICA, within less than the ninety (90) days from the 6th day of January, 1954, the date of the denial of petitioner's application for a rehearing, and which was denied without opinion, and which had theretofore been filed within twenty (20) days after the affirming of the lower court.

That filed herewith is ———— printed copies, examined and approved by the Attorney General of Indiana, Counsel for Respondent, of a partial record in the Supreme

Court of Indiana, and proceedings had in the trial court, after the opinion and decision had been certified back to the trial court by the Clerk of the Supreme Court of Indiana, and a stay of judgment and approval of a supersedeas bond by the judge of the trial court. Omitting captions and formal parts, as follows:

NOTICE TO ATTORNEY GENERAL OF INDIANA OF APPELLANT'S INTENTION TO FILE A PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

You are hereby notified that a Petition for a Writ of Certiorari, in behalf of the appellant, in the above-entitled cause, is proposed to be and will be filed in the office of the Clerk of the Supreme Court of the United States forthwith, under Rule 38½ of the Supreme Court of the United States (approved June 25, 1948) for a review of the proceedings of the Supreme Court of Indiana (under U. S. C., Sec. 1257, Title 28, Paragraph 3, 1948) in Cause No. 28986, wherein Isaac Mitchell, petitioner herein, was appellant therein, and the State of Indiana, respondent herein, was the appellee therein, and which said cause the Supreme Court of Indiana affirmed the judgment of the Criminal Court of Marion County, Division No. 2, on the 19th day of November, 1953, and that thereafter on the 6th day of January, 1954, the petition of the appellant for a rehearing was denied without opinion.

The attention of the Attorney General of Indiana is hereby directed to Paragraph Three (3) of Rule Twelve (12) of the Supreme Court of the United States, set forth in Volume Sixteen (16), United States Supreme Court Digest, at page 10 and 12 thereof, to-wit:

"Within 15 days after such service the appellee may file with the Clerk of the Court possessed of the Record, and serve upon the appellant a typewritten statement disclosing any matter of ground making against the jurisdiction of this Court asserted by the appellant, there may be included in or filed with, such opposing statement, a motion by appellee to dismiss or affirm, where such motion is made it may be opposed as provided in Rule 7, Paragraph 3."

That attached hereto is a copy of:

1. Copy of minutes in the Journal Entries.
2. Copy of Appellant's Assignment of Errors.
3. Copy of Defendant's Motion for a New Trial in lower court.
4. Copy of Defendant's Pleas in Abatement in lower court.
5. Copy of Defendant's Motion to Quash in lower court.
6. Copy of Opinion of Supreme Court of Indiana.
7. Copy of Appellant's Petition for a Rehearing.
8. Copy of Supreme Court's ruling on same without opinion.
9. Copy of Judgment in lower court.
10. Copy of Verdict of Jury in lower court.
11. Copy of State's Exhibit No. 1 in lower court.
12. Indictments.
13. Copy of Motion to Suppress.
14. Copy of Ruling thereon.
15. Copy of Stipulation regarding Motion to Suppress.
16. Copy of Stipulation to try all eight cases together before a jury.
17. Copy of this Praecipe.

s/ Tyrah Ernest Maholm

Tyrah Ernest Maholm
Counsel for Petitioner

CERTIFICATION OF SERVICE

Service accepted and receipt acknowledged of pleadings and papers described hereinabove this *6th* day of *February*, 1954.

s/ Edwin K. Steers

Edwin K. Steers
Attorney General of Indiana
Counsel for Respondent

By: ..... Deputy

FEDERAL QUESTIONS RAISED BELOW

1. The federal question of due process of law was first raised in the eight (8) pleas in abatement in the trial court. Record Page Nos. 22-44.

2. The federal question of due process of law was again raised in the eight motions to quash the evidence obtained by an unreasonable and unlawful seizure of property. Record Page No. 48.

3. The federal question of due process of law was again raised in the motions to suppress all evidence. Record Page Nos. 49-53.

4. The federal question of due process of law was again raised in appellant's motion and supplemental motion for a New Trial in the Trial Court. Record Page Nos. 57-82.

5. The federal question of due process of law in the Motion for a Rehearing in the Supreme Court of Indiana. Record Page Nos. 92-104.

All of which was overruled and denied in the lower courts.

REASONS FOR GRANTING THE PETITION

The court below has passed on several important questions affecting substantial rights of the petitioner herein. The decision rests upon a pronouncement by the court below that the petitioner, by stipulation of the trial court, did thereby waive the illegality of the search and seizure.

The most important question presented by this petition is, (a) Was the eight (8) judgments of conviction herein or either of them valid? (b) Did the Criminal Court of Marion County, Indiana, Division No. 2, the Trial Court,

ever attain legal jurisdiction of the person or the subject matter? The Supreme Court of Indiana has held in the instant case that Sec. 48-6111 of Burns' Indiana Replacement of 1950 to be unconstitutional and void, and held as follows:

> "Statute permitting Chief of Police to authorize search of premises and seizure of gaming or lottery tickets found thereon, upon report in writing by two or more householders or two (2) members of police force, reciting good grounds for belief that any premises within the city are used as a common gaming house, was unconstitutional and void in absence of provision for judicial determination of probable cause for issuance of search warrant. Burns' Ann. St. Sec. 48-6111; U. S. C. A. Const. Amend. 4; Const. Art. 1, Sec. 11."
>
> Mitchell v. State, 115 N. E. (2d) 595, 597,

and they declare:

> "The question of the constitutionality of the above quoted statute was presented in a number of different ways. That question having been settled the rule generally is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void and in legal contemplation is as inoperative, as if it had never been passed."
>
> Chicago, I. and L. R. Co. v. Hackett, 228 U. S. 559, 57 L. Ed. 996, 33 S. Ct. 581;
> Norton v. Shelby County, 118 U. S. 425, 30 L. Ed. 178, 6 S. Ct. 1121;
> Louisiana v. Pilsbury, 105 U. S. 278, 26 L. Ed. 1090.

Such a statute leaves the question that it purports to settle just as it would be, had the statute never been enacted. A judgment of any court which is based on an unconstitutional law, it has been said—has no legitimate basis and is not to be treated as a judgment of a competent tribunal, a conviction under it, is not merely erroneous,

but is illegal and void and cannot be a legal cause of imprisonment. Such a law bestows no power or authority on anyone, affords no protection and justifies no acts performed under it.

11 Am. Jur. 829, Sec. 149.

The opinion rendered by the Supreme Court of Indiana in the instant case, proceeds on the theory that petitioner herein waived his right to complain about the illegal search, a motion to suppress was duly filed in which the illegality of the search was squarely presented.

It is a universal rule of law that parties cannot by consent give a court, as such, jurisdiction of subject matter of which it would otherwise have no jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver or estoppel.

14 Amer. Jur. 380, Sec. 184, (13)
Grubb v. Ohio Pub. Utilities Comm., 281 U. S. 470
and many other authorities.

The general rule is that an unconstitutional act of the legislature protects no one. It is said that all persons are presumed to know the law, meaning that ignorance of the law excuses no one. Consequently, if anyone acts under an unconstitutional statute, the general rule is that he does so at his peril and must take the consequences. This warning has been so phrased as to present the actual concept underlying the utter nullity of an invalid law by holding to the effect that all persons are held to notice, that all statutes are subject to all express and implied provisions of the Constitution and also, that, should a conflict between a statute and any express or implied provision of the Constitution be duly adjudged, the Constitution by its own superior force and authority would render the statute invalid from its enactment. And further, that the Courts

have no power to control the effect of the Constitution in nullifying a statute that is adjudged to be in conflict with any of the express or implied provisions of the Constitution. Rights acquired under a statute while it is duly adjudged to be constitutional are valid legal rights that are protected by the Constitution, not by judicial decision. But rights acquired under a statute that has not been adjudged valid are subject to be lost if the statute is adjudged invalid though the statute was considered valid by eminent attorneys, public officers and others.

(11 Am. Jur., Sec. 149, p. 830)

The general principle that legal effect should not be given to unconstitutional law, has been applied to statutes creating criminal offenses which are in violation of the Constitution. It has been decided that an offense created by an unconstitutional law is not a crime. A conviction under it is not merely erroneous but is illegal and void and cannot be a legal cause of imprisonment. The courts must liberate a person imprisoned under it just as if there had never been the form of a trial, conviction and sentence. Thus one imprisoned by the judgment of a court which is without jurisdiction in the premises because proceeding under an unconstitutional law may be discharged by the Writ of habeas corpus.

The petitioner herein was lawfully in possession of the premises, as lessee, and, the statute under which the police officers presumed to act, now having been declared unconstitutional, from the time of its enactment, and said void and unconstitutional law, was the force which set in motion, all of the unlawful acts, and the unlawful seizure of property, regardless of whom it belonged to, was an unlawful seizure and the production of the books, papers and records before the grand jury was an involuntary appearance of the defendant therein, petitioner herein, by reason of

the unlawful search and seizure, conducted by respondent herein, (Hinshaw v. State (1897), 147 Ind. 334, 47 N. E. 157).

The books, papers, records and documents of the defendant seized under the unlawful search, where no arrest of the defendant was had and for the sole purpose of obtaining evidence to be used in establishing the commission of an offense were unlawfully seized and the seizure unconstitutional and void.

> Callender v. State (1922), 193 Ind. 91, 97, 138 N. E. 817;
>
> Dearing v. State (1948), 226 Ind. 273, 276, 79 N. E. (2d) 535.

The seizure or compulsory production of a man's private papers to be used as evidence against him is equivalent to compelling him to be a witness against himself and within the prohibitions of the Constitution.

> Boyd v. U. S. (1885), 116 U. S. 619, 29 L. Ed. 747;
> State Constitution, Art. 1, Sec. 13.

The production of said books, papers and records before the Grand Jury constituted testimony before the Grand Jury and defendant was immune from indictment by said Grand Jury. Sec. 9-1604 Burns' Ind. Stat. Replacement of 1950, grants such immunity.

> Sec. 9-1604—Any person called as a witness to testify against another for gaming, or for keeping any gambling apparatus, or any device or trick to procure money or for keeping a place to be used for gaming or for engaging in any lottery scheme or gift enterprise or raffle, is a competent witness to prove the offense although he may have been concerned as a party and he shall be compelled to testify as other witnesses, but such evidence shall not be used against him in any

prosecution for such or any other offense and he shall not be liable to trial by indictment or affidavit or to punishment for such offense.

Article 1, Sec. 14, Constitution of the State of Indiana,

reads as follows:

"No person in any criminal prosecution shall be compelled to testify against himself."

Petitioner herein was denied his constitutional rights, of due process of law, in violation of the 14th Amendment to the Constitution of the United States of America, by the denial of his rights under Art. 1, Sec. 14, above. Art. 1, Sec. 14, and in violation of Sec. 9-1604 Burns' Indiana Statutes, 1950 Replacement. All of such acts and methods of respondent herein cannot be squared with that due process of law which the Fourteenth Amendment commands.

Haley v. State of Ohio (1948), 68 U. S. Sup. Ct. Rep. 303.

WHEREFORE, petition respectfully prays that a Writ of Certiorari be issued under the Seal of the SUPREME COURT OF THE UNITED STATES OF AMERICA, directed to the Supreme Court of Indiana, commanding said Supreme Court of Indiana to Certify and send to this honorable Court a full and complete transcript of the record and all proceedings had in the said court, pleadings filed, and rulings thereon, said Supreme Court of Indiana being the Court of last resort in said State of Indiana.

To the end that said cause may be reviewed and determined by the SUPREME COURT OF THE UNITED STATES OF AMERICA, as provided by law, and the said eight judgments of conviction, and the opinion of the Supreme Court of Indiana be reversed.

AND YOUR PETITIONER HEREIN WILL EVER PRAY.

s/ TYRAH ERNEST MAHOLM,

TYRAH ERNEST MAHOLM,
Counsel for Petitioner,
711 East 10th Street,
Indianapolis, Indiana.

STATE OF INDIANA
SS: VERIFICATION
COUNTY OF MARION

Isaac Mitchell, being duly sworn upon his oath, says, that he is the petitioner in the above-entitled cause, which is an application by him for a Writ of Certiorari to the Indiana Supreme Court. That he was the appellant and the State of Indiana was the appellee, in the Supreme Court of Indiana, that he has read the foregoing petition and that the matters and facts therein and herein related are true as he verily believes.

s/ Isaac Mitchell

Isaac Mitchell

Subscribed and sworn to before me this 6th day of February, A.D. 1954.

s/ Margaret L. Maholm

Margaret L. Maholm,
Notary Public.

My commission expires:
April 22, 1955.

CERTIFICATE OF COUNSEL

I do hereby certify that I, have carefully examined the foregoing verified petition for a Writ of Certiorari and the allegations therein contained, are true, as I verily believe, and in my opinion the petitioner is entitled to the redress sought therein.

s/ Tyrah Ernest Maholm

Tyrah Ernest Maholm,
711 East 10th Street,
Indianapolis 2, Indiana,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM—1953

No. .....

ISAAC MITCHELL,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I.

SEARCH AND SEIZURE BY VIRTUE OF AN AUTHORIZATION ISSUED BY A CHIEF OF POLICE PURSUANT TO AN UNCONSTITUTIONAL LAW EQUIVALENT TO A SEARCH AND SEIZURE WITHOUT A SEARCH WARRANT.

Said Authorization being in the following, to-wit:

AUTHORIZATION

"Pursuant to Sec. 48-611, Vol. 9, Part 2, Burns' Revised Statutes, 1950 Replacement, report has been made to me in writing that the premises located at 248 Indiana Avenue (1st Floor, basement) are used for the deposit or sale of lottery tickets and policies and that said premises are used for engaging in gaming enterprises, and used for playing for wagers or at games of chance. Now therefore, I hereby authorize Noel Jones to enter said premises, arrest all

persons there found offending against the law and seize all instruments of gaming and lottery tickets and deliver same to me."

Signed: John J. O'Neal,
Acting Chief of Police
Indianapolis, Indiana
December 10, 1951.

It is the contention of Appellant that the above "Authorization," of which the police officers acted under, is not a search warrant, and does not purport to be, nevertheless it performed the functions of a search warrant, although issued under an unconstitutional and void Indiana Statute, Burns' Sec. 9-6111, Replacement 1950, and not under Sec. 9-601, which provides—Justice of the Peace, Judge of any City, Court or Magistrate's Court or Judge of any Court of Record may issue warrants to search any house or place, there was no search warrant of any kind and the officers entered defendant's premises without any command of a court, the only process being that issued by virtue of Sec. 48-6111, Burns' 1950 Replacement, and such seizure was therefore in violation of the defendant's constitutional rights.

Dalton v. State (1951), 230 Ind. 626, 632, 105 N. E. (2d) 509.

1. The "Authorization" under which the officers entered was not verified, as required by the search warrant law, Art. 1, Sec. 11, Indiana Constitution and Sec. 9-602, Burns' Statute Replacement, 1942. The Chief of Police has no power to authorize any police officer to enter premises and make a search of the same.

Solomon v. State (1934), 156 S. 401, 115 Fla. 310;
Wallace v. State (1927), 199 Ind. 317, 326 et seq., 157 N. E. 657, and cases there cited;
Bedenarzik v. State (1933), 204 Ind. 517, 185 N. E. 114.

Indiana Statute 9-602, as to search warrants, specifically enumerates gambling implements as objects which may be searched for, Indiana Acts 1951, Chapter 199, p. 541 (Amendment).

> "The warrant is not allowed for the purpose of obtaining evidence of an intended crime, but only after lawful evidence of an offense actually committed; nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases, where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it, or in its destruction."
>
> Cooley on Constitutional Limitations 6th Ed., p. 370.
>
> The only lawful mode of making search of one's premises is under the command of search warrants and these are allowed to discover stolen or smuggled goods or implements of gambling, and a few other cases for which provision must be found in the statutes. The authority to issue them is liable to great abuse, and the law is strict regarding their requirements."
>
> Cooley on Torts, Vol. I, p. 295.

POINT II.

If the books, papers, records and documents of petitioner were secured by a search and seizure under the pretext of the so-called "Authorization," which was unconstitutional and void, then the property so seized could not be lawfully used by the state before the Grand Jury to secure an indictment against the defendant.

U. S. v. Mounday (1913), 208 Fed. 186;

20 Am. Jur. 352, 353, Sec. 3931;

State v. Marxhausen (1919), 204 Mich. 559, 171 N. W. 557;

Wallace v. State, Supra.

2. The production of said books, papers, and records before the Grand Jury, constituted testimony before the Grand Jury and defendant was immune to indictment before such Grand Jury.

Ind. St. 9-1604—Replacement of 1942.

"Any person called as a witness to testify against another for gaming, or for keeping any gaming apparatus or any device or trick to procure money, or for keeping a place to be used for gaming or for engaging in a lottery scheme or gift enterprise or raffle, is a competent witness to prove the offense, although he may have been concerned as a party, and he shall be compelled to testify as other witnesses but such evidence shall not be used against him in any prosecution for such or any other offense, and he shall not be liable to trial by indictment or affidavit or to punishment for such offense."

(Indiana Acts 1905, Ch. 169, Sec. 236, p. 584.)

Sec. 9-1605—"Whenever any person is required to testify touching the commission of any misdemeanor, his evidence therein shall not be used in any prosecution against him, except in case of perjury committed by him, therein; and he shall not be liable to trial by indictment or affidavit or to punishment for such misdemeanor."

(Indiana Acts 1905, Ch. 169, Sec. 237, p. 584.)

POINT III.

Article 1, Section 14 of the Constitution of Indiana provides:

"No person in any Criminal prosecution shall be compelled to testify against himself."

"The legislature cannot abridge privilege of defendant against self-incrimination, and if it provides for immunity against prosecution upon compulsory testimony, the immunity is as broad as the constitu-

tional guaranty and protects the witness from all prosecutions.

Overman v. State (1925), 194 Ind. 483, 488, 143 N. E. 604."

POINT IV.

There was no waiver of rights to testify by the involuntary appearance of the defendant before the Grand Jury, by and through the subpoena issued to the police officers who brought defendant's books, papers and records before the Grand Jury.

Malloney v. United States (Mass. 1935), 79 Fed. (2d) 566, cert. den. 296 U. S. 658, 56 S. C. 383, 80 L. Ed. 468;

Weeks v. U. S. (1913), 232 U. S. 383.

POINT V.

All of the evidence seized whether contraband or not was seized without legal process, since the authorization issued under Sec. 48-6111, Ind. St. 1950 Replacement was not sufficient to give the police officers right of search and seizure.

McDonald v. United States (1948), 335 U. S. 451, 69 S. Ct. 191.

POINT VI.

"The fact that the articles were taken illegally from the defendant's premises required that the court suppress all such evidence so seized whether contraband or not."

Wallace v. State (1927), 199 Ind. 317, 326 et seq.

POINT VII.

The court erred in its opinion and decision in holding that the case of May v. State (1953), unofficially reported

112 N. E. (2d) at page 439, 441 as authority for the holding that there was a waiver of the illegality of search, for the reason of the factual difference in the two cases. In that case, it was said by Judge Draper,

> "It does not appear that the appellant owned, possessed, controlled, or had any interest of any kind whatever in that portion of the premises in which the pants were found, or that he owned, possessed, had or claimed any interest whatever in the pants themselves. In fact he testified he had never worn the pants. The appellant could not avail himself of objection to the legality of the search and seizure of the property of a third person."

POINT VIII.

The record and the issues in this cause show definitely the petitioner herein, appellant therein, did have a proprietary right and interest in the premises, and that he did own at least a part of the property seized, and under such facts the appellant could not be bound by the statements of law as expressed in the May case.

The police officers were there unlawfully upon petitioner's premises, they had violated the constitutional rights of petitioner herein, they had no search warrant, were not in pursuit of a felon, did not see anyone committing a misdemeanor and held no warrant for the arrest of any person, supposed to be within the premises of petitioner herein, as the testimony and evidence of the police officers, so stated, and yet acting under the belief that this void "Authorization," gave them that authority, did break down locked doors and seize certain personal property, which they claimed to be gaming devices, and unlawfully carted them away to and before a Grand Jury and used them as exhibits to influence said Grand Jury, in returning eight (8) indictments against petitioner herein.

POINT IX.

In the cases of State ex rel. Beamon v. Gibson and Pike Counties (1950), 288 Ind. 190, and Tucker v. State (1941), 218 Ind. 614, hold that an enactment which is unconstitutional and void is void ab initio and therefore no one can acquire rights under it, and all acts done pursuant to its authority are also void.

Thus the real issue in this case is whether the State ever acquired any rights under such enactment to act at all and when and how does a waiver of constitutional rights operate under an unconstitutional enactment.

And as held in Campbell v. State (1951), — Ind. —, 96 N. E. (2d) 876.

> "Where a defendant is denied his rights under due process and due course of law clauses of Federal and State Constitutions all procedural rules that would prevent their consideration or leave them to the discretion of the trial court, must yield to the fundamental principles of due process and due course of law, and all proceedings on the case thereafter, are void."
>
> Const. Art. 1, Sec. 12, 13 U. S. C. A. 14;
> State v. Blackford Circuit Court (1950), — Ind. —, 95 N. E. (2d) 556, 557.

POINT X.

The State of Indiana has no law, which permits evidence illegally obtained to be admitted as evidence.

CONCLUSION

The Writ of Certiorari should be granted and the decision of the Supreme Court of Indiana should in all things be reversed, on account of having denied petitioner herein, due course and due process of law.

Respectfully submitted,

TYRAH ERNEST MAHOLM,
711 East 10th Street,
Indianapolis 2, Indiana,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 671

ISAAC MITCHELL,

Petitioner,

v.

STATE OF INDIANA

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Opinion Below

The opinion of the Supreme Court of Indiana is reported unofficially at 115 N.E. (2d) 595.

Jurisdiction

As stated in petition the jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). In notice of filing of petition (14) it is stated that petition will be for a review under "U.S.C., Sec. 1257, Title 28, Paragraph 3, 1948."

Statement of the Case

In eight separate indictments petitioner was charged with, and upon trial by jury, was convicted and sentenced for certain violations of the gaming laws of the State. After

the filing of separate pleas in abatement in each cause to which demurrers were sustained, and the overruling of a separate motion to quash each indictment, the separate causes were by agreement consolidated for trial. A motion to suppress evidence because of alleged unlawful search and seizure was filed, hearing was had thereon, evidence adduced, and at the conclusion of the hearing it was found that certain of the property seized belonged to petitioner, and that petitioner denied ownership of or interest in all other property seized or the premises searched. That the parties thereupon agreed and stipulated in open court that all property claimed by petitioner should be returned to him, and it was ordered returned by the court, and as to all other property the motion to suppress should be and was overruled. Under such finding, agreement and stipulation the States Court held that objections to the illegality of the search were waived. (R. 88.)

At several points in his petition and brief petitioner erroneously asserts that the property seized and the premises searched were owned or controlled by petitioner. In his petition (4) petitioner states that on December 11, 1951 (date of search) he was the lessee of certain premises, located at number 248 Indiana Avenue, and that there was included in said lease an upstairs room used as office space and designated as 245 North Capitol Avenue.

According to petitioner's own testimony given on motion to suppress which has been made a part of the printed record in this Court by Supplemental Transcript (SR. 110-121) he had subleased all the first floor to a third party who was in possession on the date in question and that petitioner had no control over the same. (For the purpose of clarifying the matter, the record below shows that the real property involved is situated in a triangle formed by Capitol Avenue running north and south and Indiana Avenue running in a

northwestwardly direction, and that the first floor referred to extends from Indiana Avenue west to Capitol Avenue).

Petitioner further states (5) in substance that after entering the premises at 248 Indiana Avenue the officers went into the partitioned office of petitioner and the back room of the premises seized; that at the same time other officers entered premises described as 245 North Capitol Avenue, also leased by petitioner herein, and there seized and carried away a filing cabinet and other articles found there. No facts are disclosed by the printed record herein to support the entry into 245 other than from 248 as first asserted by petitioner. By his own testimony given on hearing on motion to suppress it is shown (SR. 110-121) that on the date of the search the whole of the first floor including the back end was leased to a third party and that petitioner had no control of the premises and did not own any of the property found there.

Further petitioner again asserts (20) that he was lawfully in possession of the premises, as lessee, without identifying the premises to which he refers.

Petitioner complains in substance that said search and seizure and the production of the books, papers and records before the grand jury was an involuntary appearance of the defendant therein, petitioner herein. But respondent submits that no facts are presented by the record herein to show that any books, papers or records of the petitioner were presented to the grand jury, or their nature. In any event such questions were reviewed by the State Court with the whole record before it, and it has ruled against petitioner's said contentions.

In conclusion petitioner contends that he was "denied his constitutional rights, of due process of law, in violation of the 14th Amendment to the Constitution of the United States of America, by the denial of his rights under Art. 1, Sec. 14,

above, Art. 1, Section 14, and in violation of Sec. 9-1604 Burns' Indiana Statutes, 1950 Replacement'' (22). A claim in such broad terms adds little as a ground for the granting of his petition for writ of certiorari.

For the most part petitioner has set out in the printed record herein the pleadings only which do not show the facts upon which the decision of the State Court rests.

Argument

A

Jurisdiction should not be assumed by this Court, and the writ of certiorari should be denied because the petitioner has not brought to this Court a record showing facts sufficient to invoke its jurisdiction under the statutory authority claimed.

28 U. S. C. 1254 (1) is not applicable in a case of this kind. The (3) paragraph of 28 U. S. C. 1257 would seem to be the statute upon which petitioner seeks to invoke the jurisdiction of this Court. Section 1257 provides for the review of final judgments or decrees rendered by the highest Court of a State in which a decision could be had. Clearly the petition does not attempt to bring this proceeding under (1) or (2) of said section. Nor is there any showing that the validity of a treaty or statute of the United States, or the validity of a State statute is drawn in question. Therefore in order to invoke the jurisdiction of this Court in this case, the petitioner must bring himself within the last condition described in said clause (3), e. g. ''or where any title, right, privilege or immunity is especially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States,'' or in common phraseology, a title, right, privilege or immunity falling within the protection of the Fourteenth Amendment. Giving petitioner the benefit of the doubt the most that can be said is that he is

basing his claim upon the alleged fact that certain contraband property was seized in part under an illegal authorization and in part without any warrant which was afterward in the trial of said clause admitted in evidence over the objections of petitioner. See motion to suppress (50), particularly the language: "and that upon the presentation of said demand and purported authority, the affiant caused the door of said premises to be opened to said police officers and other officers, who did then and there enter and proceed to search said premises as described in said authorization, but in addition to the first floor (1st) and basement, described in said purported authorization, did break and enter into a second floor office room in said premises, and did then and there seize and carry away, the following described property" etc.

But the admission of evidence obtained by illegal search and seizure in a state court does not come under the protection of the Fourteenth Amendment.

In a prosecution in a state court for a state crime, this amendment does not forbid the admission of evidence obtained by unreasonable search and seizure though the evidence would be inadmissible in a prosecution for violation of federal law in a federal court because of a violation of the Fourth Amendment. *Wolf* v. *People of the State of Colorado,* 338 U. S. 25, 33, 69 S. Ct., 1359, 1364, 93 L. ed. 1182; *Irvine* v. *People of State of California,* 74 S. Ct. 381, 383; *McIntyre* v. *State,* 312 U. S. 695, 61 S. Ct., 732. See *Stefanelli* v. *Minard,* 342 U. S. 117, 119, 122, 72 S. Ct., 118 119-121.

In the *Wolf* case, *supra,* 338 U. S. 25, 69 S. Ct., 1359, 1364, this Court declared, "We hold, therefore, that in a prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

It follows that there is no sufficient showing to invoke

the jurisdiction of this Court to grant the petition for writ of certiorari herein.

B

The record here presented by the petitioner shows that the decision of the state court is based upon adequate non-federal grounds.

The record herein together with the Supplemental Record show that before the trial the petitioner-defendant filed a motion to suppress evidence; (R. 49) that a hearing was had thereon (R. 53) evidence was adduced, and at the conclusion of the hearing it was found (R. 53; SR. 110-121) that certain of the property seized belonged to petitioner, that the petitioner denied ownership of or interest in all the other property seized or the premises searched; that the parties thereupon agreed and stipulated in open court that all property (then) claimed by petitioner should be returned to him, and it was ordered returned by the court, and as to all other property the motion to suppress should be and was overruled. According to petitioner's own testimony given on motion to suppress (SR. 110-121) he had sub-leased all the first floor to a third person who was in possession on the date in question and that petitioner had no control over the same. Under the finding, agreement and stipulation the state court held that objections to the illegality of the search were thereby waived. And the state court further declared in its opinion (89) "The question of the constitutionality of the above-quoted statute is presented in a number of different ways. However, having decided that question, and that the illegality of the search was waived, we will give no further notice to this question when further specifically presented."

The parties in this case, with the defendant present in person as well as by counsel, had the right to make the agreement concerning the evidence obtained by unreason-

able search. A legal search may be made without a warrant, and one may waive his constitutional right against search and seizure by consenting thereto and, if he does so knowingly and freely and without coercion, he cannot object to the use of evidence obtained on such search. *McAdams* v. *State* (1948), 226 Ind. 403, 410. The state court has ruled that the constitutional right, "to be secure in their persons, houses, papers and effects against unreasonable search or seizure" (Art. 1, § 11, Indiana Constitution), is a personal right. *Snedegar* v. *State* (1925), 196 Ind. 254.

The state court has held that one who disclaims or does not have any interest in the property seized or the premises searched cannot object to admission of evidence obtained in such search. *Tongut* v. *State* (1926), 197 Ind. 539, 543; *May* v. *State* (1953), — Ind. —, 112 N. E. (2d), 439.

This Court has held that the admission of evidence in a criminal case which the highest state court decided did not violate the rights of the accused under the state constitution and laws cannot involve a question of due process of law sufficient to merit the sustaining of a writ of error. *Barrington* v. *Missouri,* 205 U. S. 483, 486.

The decision of this cause by the highest Court of the state may and does rest upon substantial non-federal grounds, and no substantial Federal ground is involved or affected. Therefore, the petition for writ of certiorari should be denied.

C

The petitioner rests his case upon asserted facts which would impeach and contradict the positive recitals in the opinion and decision of the state court, and the judgment record of the court in which he was convicted and sentenced.

The facts found and declared by the highest court of the state where there is no attempt to evade a Federal question are entitled to weight, and should not be cast aside

upon the mere assertion of the petitioner unsupported by anything in the record which he has presented to this Court. With the entire record of the proceedings in the trial court before it the Supreme Court of Indiana, the highest court of the state, determined in favor of petitioner that the state statute purporting to authorize search and seizure without a warrant was unconstitutional and void. It further holds that petitioner waived his right to the admission of evidence obtained by unreasonable search under the circumstances and by reason of the agreement and stipulation made between the parties, following his denial under oath as a witness of any interest in the property or the premises, in question. And after a review of other alleged errors found no reversible error and affirmed the judgment of the trial court. Its decision being based upon adequate non-federal grounds and there being no Federal question involved or decided it should not be disturbed, and the petition for writ of certiorari should be denied.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted.

EDWIN K. STEERS,
Attorney General of Indiana,
OWEN S. BOLING,
Deputy Attorney General,
Counsel for Respondent.